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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1854

LENNIE B. WARREN and EVERETTE R. WARREN,
Appellants,

VERSUS

SUN OIL COMPANY (Delaware), a corporation,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OKLAHOMA

APPELLANTS' BRIEF IN OPPOSITION

STEPHEN JONES
P. O. Box 3339
Enid, Oklahoma 73701

Counsel for Appellants

September, 1979

UTTERBACK TYPESETTING CO. — PHONE 235-0030 — 3740 S. HOLLIDAY AVE. — OKLA. CITY, OKLA. 73115

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ON APPEAL FROM THE SUPREME COURT OF OKLAHOMA

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The Appellee, in its Motion to Dismiss in No. 78-1854, improperly cites this Court's holding in *Cities Service Gas Company* v. *Peerless Oil and Gas Company*, 340 U.S. 179, 95 L.Ed. 190 (1950). That case involved an appellant who was *actively* producing gas from over 150 wells. Certainly the appellant was not opposing production. In fact, it was the appellee, in whose favor the Court ruled, who was arguing trespass and waste rather than the appellant, as is the case here.

This revision of the Court's holding and the relevant facts in *Cities Service*, reflects the Appellee's consistent reluctance to directly address the issue in controversy here.

Appellants stated in their Jurisdictional Statement that they recognize that mineral owners who have leased their mineral interest and lessees of mineral interest do indeed come within the purview of a State's police powers and hence, are subject to compulsory unitization orders.

However Appellants again urge that owners of mineral interests who are neither developing such interests on their own and not leasing such interests to others for development, have demonstrated *no* disposition to develop sources of oil and gas. And having demonstrated such, therefore have *not* placed themselves in a position to be subject to the State's police powers, when such power is exercised for the purpose of *conserving* oil and gas.

The Appellants have no desire to develop any oil and gas which might underlie their property. Thus, they view any intrusion upon their land for the purpose of developing oil and gas which might underlie same as an unlawful intrusion and an unconstitutional taking of property.

The issue then is whether under these circumstances the State Corporation Commission nonetheless has the constitutional authority to develop said oil and gas by their unilateral action, all under the guise of "conservation." Appellee's Motion to Dismiss does not discuss this issue. However the Appellee has failed to address the question presented to this Court in this appeal.

Appellee's contention that the constitutional issues were not properly brought before the highest Oklahoma court is likewise without merit. The Appellants have already shown this Court that the constitutional question

was properly raised. In their Petition for Rehearing before Division 2 of the Oklahoma Court of Appeals, the Appellants claimed that if 52 O.S. § 287.5 permits the Oklahoma Corporation Commission to "authorize compulsory unitization of landowners' property when there is no valid lease, then such statutes are in violation of the Fourteenth Amendment to the Constitution of the United States, and this Court should so hold." In addition, this claim was reiterated in Appellants' Writ of Certiorari to the Oklahoma Supreme Court wherein the Appellants stated, ". . . that any provision of 52 O.S. § 287.5 . . . that purports to grant authority for the unitization of property not under lease is in violation of the due process law of the Oklahoma Constitution and the Fourteenth Amendment to the Constitution of the United States." (See Appendix, p. 8, Appellants' Jurisdictional Statement.)

Clearly the Appellants properly and timely raised in explicit language before the highest court of Oklahoma the substantive federal constitutional question. This is so even though the Court's denying the Petition for Rehearing and the Petition for Certiorari were silent with respect to the constitutional questions. *Herb* v. *Pitcairn,* 324 U.S. 117, 89 L.Ed. 789, 65 S.Ct. 459 (1945); *Whitney* v. *California,* 274 U.S. 357 (1927); and *Cincinnati, P.B.S.&P. Packett Company* v. *Bay,* 200 U.S. 179 (1906). Moreover, this Court has expressly held that when the federal question appears for the first time in a Petition for Rehearing filed with the highest state court, the question is deemed to have been properly raised. *Illinois Central R. Company* v. *Kentucky,* 218 U.S. 551 (1910).

Appellee is well aware that any representation that the constitutional question was not properly presented is wholly unmeritorious. Appellants' interests in the matter before this Court were not protected by legal counsel *nor litigated* until the case which gave rise to this appeal was filed in the District Court of Grant County, Oklahoma.

Appellants did not appeal the order creating the Hawley West Unit because the Commission indicated Appellants' remedy lay within the jurisdiction of the District Courts only. Just prior to the (1974) Corporation Commission Hearing Appellants had filed a lawsuit in the District Court of Grant County which resulted in a court order holding (See Appendix A hereto):

> "The Court finds the issues in the First Cause of Action, as shown in the amended petition are fully sustained in Plaintiff's favor; against each and all the Defendants herein; the Oil Lease, because of non-production, became in inactive status and regular produc- of Oil and Gas ceased in November, 1971; therefore, the Oil and Gas Lease terminated as of December 1, 1971; and, that upon termination and failure to remove the material within a reasonable time, all the personal property and equipment, above and below ground on said Lease and used in the Oil operations, became the property of the land owner, Lennie B. Warren.
>
> "It is the further finding of the Court, that the Owner, Lennie B. Warren, is entitled to a decree, quieting the title to the minerals against each and all the Defendants, namely, Blaik Oil Co., a Corp., Sun Oil Co., a Corp., and Creslenn Oil Co., a Corp., and they should be decreed to have no right, title, or interest in the mineral rights in and under said lands owned and possessed by Lennie B. Warren, Plaintiff herein; all the mineral rights in and under the lands described as follows: The East Half (E/2) of Northwest Quarter (NW/4) of 2-26N-8W, Grant Co., Okla., are confirmed as resting in Lennie B. Warren.

This order was never appealed by Appellee although it resolved *against* them, their assertion in their Application for creation of the Hawley West Unit, that they were the owner of the mineral interest (See Appendix B hereto) to-wit:

> "1. Comes now Sun Oil Company, P. O. Box 2039, Tulsa, Oklahoma 74102, applicant herein, and respectfully alleges and states that it is the *record owner* and operator of valid oil and gas leases covering the below described lands in Grant County, Oklahoma.
>
> 2. A. That this is the application of Sun Oil Company (Delaware) for an order creating the Hawley West Unit, having for its purpose the unitized management, operation and further development of the Mississippi Chat Formation, common source of supply, underlying:
>
> *Township 27 North, Range 8 West, Grant County, Oklahoma:*
>
Section 21:	All	Section 32:	All
Section 28:	All	Section 33:	All
Section 29:	SE¼	Section 34:	All
Section 31:	S½ and NE¼ .		
>
> *Township 26 North, Range 8 West, Grant County, Oklahoma:*
>
Section 2:	*All*	*Section 9:*	*N½*
Section 3:	All	Section 10:	N½
Section 4:	All	Section 11:	N½"
Section 5:	N½ and SE¼		

Appellants' position on this matter is further substantiated by the findings of the Corporation Commission in 1976 when Appellee applied for an order permitting them to "inject" salt water through an abandoned well on Appellants' property. At that hearing the Commission found (See Appendix C hereto):

> "4. The testimony of the Protestants and the response filed by Lennie B. Warren were concerned with the lease and title matters, *over which the Oklahoma Corporation Commission has no jurisdiction.*" (Emphasis supplied)

Thus, it is clear that Appellants' constitutional claim has been pursued and preserved consistently and properly; first through the District Courts, then on appeal to Division 2 of the Oklahoma Courts of Appeal and finally by Petition to the Supreme Court of Oklahoma for a Writ of Certiorari.

In light of the inability of Appellee to address the issue presented to this Honorable Court in the Jurisdictional Statement without distoring the facts or citing irrelevant authority, the need for plenary review of the action is now indisputable.

Respectfully submitted,

STEPHEN JONES
P. O. Box 3339
Enid, Oklahoma 73701

Counsel for Appellants

September, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 1979, three copies of this Brief in Opposition were mailed, postage prepaid to the following:

Sun Oil Company
P. O. Box 2039
Tulsa, Oklahoma 74102

I further certify that all parties required to be served have been served.

Stephen Jones

APPENDIX A

IN THE DISTRICT COURT OF GRANT COUNTY,
STATE OF OKLAHOMA

LENNIE B. WARREN, and EVERETT R. WARREN, Plaintiffs,	)	
vs.	)	NO. C-74-2
BLAIK OIL CO., a Corp., SUN OIL CO., a Corp., and, CRESLENN OIL CO., a Corp., Defendants.	)	

JOURNAL ENTRY OF JUDGMENT
UPON PRE-TRIAL HEARINGS

This cause comes on for hearing before the District Court of Grant County, Oklahoma, on this 24th day of January, 1975, upon regular assignment for pre-trial and application for Summary Judgments upon the pleadings, and facts as divulged by Interrogatories and Depositions.

The Plaintiff's appeared in person and by and through their Attorney, T. F. Dukes; the Defendant, Blaik Oil Co., a Corp., appeared by and through it's Attorney, Jonathan C. Ihrig, of the Firm of Watts, Looney, Nichols, Johnson & Hayes; and, the Defendant, Sun Oil Co., a Corp., appeared by and through it's Attorney, James R. Cox, of the Firm of Mitchell, DeClerck, Cox & Halstead; the Defendant, Creslenn Oil Co., a Corp., failed to make an appearance.

The Court finds that the Creslenn Oil Co., a Corp., having failed to appear, is in default and all the Plaintiffs Petitions and Motions for Summary Judgment, as against it, are good and are hereby sustained and her right as to all the mineral interest is hereby quieted as against it.

The Court upon consideration of the pleadings and records on file herein, upon statements of Counsel, and upon consideration of admitted facts as shown by the records, and as per stipulations of Counsel thereto, finds that it has jurisdiction of the cause and of the parties and that certain Summary Judgments should be entered forthwith herein.

The Court finds the issues in the First Cause of Action, as shown in the amended petition are fully sustained in Plaintiff's favor; against each and all the Defendants herein; the Oil Lease, because of non-production, became in inactive status and regular production of Oil and Gas ceased in November, 1971; therefore, the Oil and Gas Lease terminated as of December 1, 1971; and, that upon termination and failure to remove the material within a reasonable time, all the personal property and equipment, above and below ground on said Lease and used in the Oil operations, became the property of the land owner, Lennie B. Warren.

It is the further finding of the Court, that the Owner, Lennie B. Warren, is entitled to a decree, quieting the title to the minerals against each and all the Defendants, namely, Blaik Oil Co., a Corp., Sun Oil Co., a Corp., and Creslenn Oil Co., a Corp., and they should be decreed to have no right, title, or interest in the mineral rights in and under said lands owned and possessed by Lennie B. Warren, Plaintiff herein; all the mineral rights in and under the lands described as follows: The East Half (E/2) of Northwest Quarter (NW/4) of 2-26N-8W, Grant Co., Okla., are confirmed as resting in Lennie B. Warren.

The Court further finds that as to the Second Cause of Action, in reference to the accountning, that it is specifically reserved by the Court for further action; and the parties involved are the Plaintiff, Lennie B. Warren and Blaik Oil Co., a Corp., Defendant.

The Court further finds that as to the damages alleged to have occurred to said land, under said Third Cause of Action, the same are determined to have lapsed upon the termination of said Lease on December 1, 1971, and that the claim thereto is lapsed by the pertinent two (2) year Statute of Limitations, as provided by Oklahoma Statutes 1971, Title 12, Section 95, Sub-sec. 3.

THEREFORE, IT IS THE ORDER, JUDGMENT AND DECREE OF THIS COURT, that the Plaintiff, Lennie B. Warren, is hereby awarded Summary Judgment against the Defendant, Creslenn Oil Co., a Corp., for failure to appear and the Plaintiff's rights as to all the mineral interests in and to said land is hereby quieted as against the Defendant, Creslenn Oil Co., a Corp.

IT IS FURTHER THE ORDER, JUDGMENT, AND DECREE OF THIS COURT, that title of Lennie B. Warren to said minerals in and to said property is hereby fully quieted as against each and every Defendant herein, and that said Defendants, Blaik Oil Co., a Corp., Sun Oil Co., a Corp., and Creslenn Oil Co., a Corp., are hereby decreed to have no interest, right, or title to said mineral rights in and under the property described as,

> The East Half (E/2) of the Northwest Quarter (NW/4) of Section Two (2), Township Twenty-six (26) North, Range Eight (8) West, Grant County, Oklahoma.

and that said mining rights and property and title thereto is vested solely in the Plaintiff, Lennie B. Warren; AND, THE COURT FURTHER ORDERS AND DECREES, that as alleged in the First Cause of Action, that said Lease became inactive and non-productive on the date of December 1, 1971, and that upon the date of termination, December 1, 1971, that all the personal property and equipment, above and below ground on said Lease and used in said Oil and Gas Mining operations, became the

sole property and equipment of the land owner, Lennie B. Warren; and, Lennie B. Warren is hereby decreed to be the sole owner thereof, and said Defendants, Blaik Oil Co., a Corp., Sun Oil Co., a Corp., and, Creslenn Oil Co., a Corp., are enjoined from making further claims thereto, and are hereby decreed to have no further right, title, or interest therein.

IT IS FURTHER THE ORDER, JUDGMENT AND DECREE OF THIS COURT, that as to the Second Cause of Action, in reference to accounting, that it is specifically reserved by the Court for further action; and the parties involved are the Plaintiff, Lennie B. Warren, and Blaik Oil Co., a Corp., Defendant.

IT IS FURTHER THE ORDER, JUDGMENT, AND DECREE OF THIS COURT, that under the Third Cause of Action, damages were alleged to have occurred to said land, and the claim for such is hereby decreed to be barred by the Statutes of Limitations (Okla. Stat. 1971, Title 12, Sec. 95, Sub-sec. 3), and that any claim to alleged damages is hereby decreed to have lapsed by pertinent statutes of limitations, since the Lease terminated on December 1, 1971, and the Third Cause is hereby dismissed as to each of the Defendants herein with prejudice.

IT IS FURTHER THE ORDER AND JUDGMENT OF THIS COURT, that no Deposition expenses have been made a part of the Court costs and that the Court Costs have up to this point in the case been and are assessed equally between the Plaintiff herein, Lennie B. Warren, and Defendant, Blaik Oil Co., a Corp.

Dated this 24th day of January, 1975.

(s) J. RUSSELL SWANSON
JUDGE

APPROVED:

(s) JONATHAN C. IHRIG
BLAIK OIL CO., a Corp., Defendant,
By: Jonathan C. Ihrig, It's Attorney.

(s) JAMES R. COX
SUN OIL CO., a Corp., Defendant,
By: James R. Cox, It's Attorney.

(s) T. F. DUKES, Her Attorney.
LENNIE B. WARREN, Plaintiff,
By: T. F. Dukes, Her Attorney.

APPENDIX B

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICANT: SUN OIL COMPANY (Delaware)		
FOR AN ORDER CREATING THE	)	
HAWLEY WEST UNIT, HAVING FOR	)	
ITS PURPOSE THE UNITIZED MAN-	)	
AGEMENT, OPERATION AND FUR-	)	
THER DEVELOPMENT OF THE MISSIS-	)	CAUSE CD
SIPPI CHAT, THE COMMON SOURCE	)	NO. 38022
OF SUPPLY UNDERLYING ALL OR	)	
PORTIONS OF VARIOUS SECTIONS IN	)	
TOWNSHIP 27 NORTH, RANGE 8 WEST	)	
AND TOWNSHIP 26 NORTH, RANGE	)	
8 WEST GRANT COUNTY, OKLAHOMA.	)	

APPLICATION

TO THE HONORABLE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA:

1. Comes now Sun Oil Company, P. O. Box 2039, Tulsa, Oklahoma 74102, applicant herein, and respectfully alleges and states that it is the record owner and operator of valid oil and gas leases covering the below described lands in Grant County, Oklahoma.

2. A. That this is the application of Sun Oil Company (Delaware) for an order creating the Hawley West Unit, having for its purpose the unitized management, operation and further development of the Mississippi Chat Formation, common source of supply, underlying:

Township 27 North, Range 8 West, Grant County, Oklahoma:

Section 21:	All	Section 32:	All
Section 28:	All	Section 33:	All
Section 29:	SE¼	Section 34:	All
Section 31:	S½ and NE¼		

Township 26 North, Range 8 West, Grant County, Oklahoma:

Section 2:	*All*	*Section 9:*	*N½*
Section 3:	All	Section 10:	N½
Section 4:	All	Section 11:	N½"
Section 5:	N½ and SE¼		

all as shown on a plat of the area attached hereto, and marked Exhibit "A".

B. That the Mississippi Chat Formation underlying this area should be declared a separate common source of supply designated as the Hawley West Unit.

C. That applicant herein has obtained the written approval of more than 63% of all the owners of interest having an interest in the lands underlying the area of the proposed Hawley West Unit.

D. That Sun Oil Company (Delaware), P. O. Box 2039, Tulsa, Oklahoma 74102, be appointed as Unit Operator.

3. LEGAL AUTHORITY: 52 O.S. 1971, Sections 287.1-287.15.

4. That in the interest of conservation, the prevention of waste and the protection of correlative rights this application should be set for hearing, that notice be given as required by law; that after the hearing an order be entered creating the Hawley West Unit having for its purpose the unitized management, operation and further development of the Mississippi Chat Formation; that said formation be declared a separate common source of supply underlying the above described lands in Grant County, Oklahoma; and that Sun Oil Company (Delaware), P. O. Box 2039, Tulsa, Oklahoma 74102, be appointed as Unit Operator.

DATED this 11th day of December, 1973.

[Italics supplied by brief writer]

SUN OIL COMPANY (DELAWARE)

By (s) T. T. JACOBSON
T. T. JACOBSON
Manager, Conservation

P. O. Box 2039
Tulsa, Oklahoma 74102
(918) 583-4300

APPENDIX C

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF SUN OIL COMPANY FOR PERMISSION TO INJECT SALT WATER INTO ITS HAWLEY WEST UNIT WELL NO. 33-1, LOCATED IN THE SE/4 NW/4 OF SECTION 2-TOWNSHIP 26 NORTH, RANGE 8 WEST, GRANT COUNTY, OKLAHOMA	CAUSE P. D. NO.7811 ORDER NO. 122221

REPORT OF THE COMMISSION

This cause came on for hearing before Don B. Edinger, Acting Trial Examiner for the Corporation Commission of the State of Oklahoma, in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, on the 25th day of May, 1976, at 1:30 p.m. by order of the Commission referring and setting the cause for hearing.

Mr. Barth P. Walker, Attorney, appeared for the Applicant, Sun Oil Company; Everett R. Warren and Lennie B. Warren, husband and wife, appeared pro se; Mr. Nathan S. Sherman, Assistant Conservation Attorney, appeared for the Commission.

The Acting Trial Examiner heard the cause and filed his report recommending that the application be granted; time was allowed within which exceptions might be filed to said report and none having been filed, the report and recommendations are hereby adopted and the Commission therefore finds as follows:

FINDINGS

1. This is the application of Sun Oil Company for permission to inject salt water into its Hawley West Unit

Well No. 33-1, located in the SE/4 NW/4 Section 2-Township 26 North-Range 8 West, Grant County, Oklahoma.

2. The Commission has jurisdiction of the subject matter herein and notice has been given in all respects as required by law and the Rules of the Commission.

3. The testimony of the Applicant and the Commission staff indicated that the Hawley West Unit Well No. 33-1 conformed in all respects to Commission requirements for water injection wells in that water will be injected through tubing and packer, the casing will be tested in conformance with Commission Rules and that fresh water zones are protected by cement.

4. The testimony of the Protestants and the response filed by Lennie B. Warren were concerned with the lease and title matters, over which the Oklahoma Corporation Commission has no jurisdiction.

5. In the interest of the protection of surface fresh water and oil and gas producing formations and for the purpose of avoiding pollution, this application should be granted.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of the State of Oklahoma:

That Sun Oil Company should be and is hereby granted permission to inject salt water into its Hawley West Unit Well No. 33-1 located in the SE/4 NE/4 Section 2-Township 26 North-Range 8 West, Grant County, Oklahoma.

DONE AND PERFORMED this 21 day of June, 1976.

OKLAHOMA CORPORATION COMMISSION

(s) Rex Privett
REX PRIVETT, CHAIRMAN

(s) Hamp Baker
HAMP BAKER, VICE CHAIRMAN

(s) Jan Eric Cartwright
JAN ERIC CARTWRIGHT, COMMISSIONER

ATTEST:

(s) Ed Overholser
ED OVERHOLSER, SECRETARY